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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/659,908	09/11/2003	Barbara Ann Kuhns	CWELC.00013	4195
22858	7590	04/04/2006	EXAMINER	
CARSTENS & CAHOON, LLP P O BOX 802334 DALLAS, TX 75380			KUHNS, SARAH LOUISE	
			ART UNIT	PAPER NUMBER

1761

DATE MAILED: 04/04/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/659,908

Applicant(s)

KUHNS ET AL.

Examiner

Sarah L. Kuhns

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 February 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 8-21 is/are rejected.
- 7) ☒ Claim(s) 6 and 7 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 102

Claims 13 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Olliver, for the reasons set forth in the previous Office Action.

Claims 13 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Waitman, for the reasons set forth in the previous Office Action.

Claims 13 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Gordon, for the reasons set forth in the previous Office Action.

Claims 13 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Baker, for the reasons set forth in the previous Office Action.

Claim Rejections - 35 USC § 103

Claims 1, 8, 14, and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, for the reasons set forth in the previous Office Action. In that Office Action these claims were rejected under 35 U.S.C. 102, but in view of Applicant's arguments the rejection has now been changed to one of obviousness. Upon reconsideration, the Examiner agrees that Olliver does not disclose the exact order of steps claimed by Applicant. However, attention is directed to *In re Levin*, 84 USPQ 232,

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which states: New recipes of formulas for cooking food, which involve addition or elimination of common ingredients, or for treating them in ways which differ from former practice, do not amount to invention merely because it is not disclosed that no one else ever did what Applicant did; Applicant must establish co action or cooperative relationship between ingredients which produces new, unexpected and useful function. See also *In re Burhans*, 154 F.2d 690, 69 USPQ 330 (CCPA 1946) (selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results); *In re Gibson*, 39 F.2d 975, 5 USPQ 230 (CCPA 1930) (Selection of any order of mixing ingredients is prima facie obvious.). It is not seen how treating the fruit differently from the prior art, by adding it after the heated liquid fraction and pectin solution have been mixed rather than adding it to the pectin solution prior to the addition of the heated liquid fraction, would create an unexpected result. Applicant is invited to submit any evidence demonstrating the new, unexpected and useful function resulting from this modification.

Claims 12 and 18 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, for the reasons set forth in the previous Office Action.

Claims 1, 14, and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Waitman, in view of Gordon and Olliver, for the reasons set forth in the previous Office Action.

Claims 2 and 3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, as applied above, in view of Ross, for the reasons set forth in the previous Office Action.

Claims 4 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, as applied above, in view of Ross and Daravingas, for the reasons set forth in the previous Office Action.

Claims 9-11, 16, and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Olliver, as applied above, in view of Ross, Baker, and Waitman, for the reasons set forth in the previous Office Action.

Claims 13 and 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ross, for the reasons set forth in the previous Office Action.

Allowable Subject Matter

Claims 6 and 7 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's arguments with regard to the order of method steps have been addressed above in the 35 U.S.C. 103 rejections.

Applicant argues that Olliver does not disclose mixing the liquid fraction, while heated, with the aqueous pectin solution. This is not deemed persuasive. It is noted that while the claim language requires that the liquid fraction be heated, it does not require that it still be heated at the time it is combined with the pectin solution. As such,

milk reads on this limitation since it is inherently pasteurized prior to use and therefore heated to the claimed temperature prior to addition to the pectin solution.

Applicant's arguments with regard to claims 6 and 7 are deemed persuasive and the rejections under 35 U.S.C. 102 over Olliver have been withdrawn accordingly.

Applicant's arguments with regard to claim 8 are not persuasive. Table jelly is known to have a homogenous or grainy appearance and absent a showing to the contrary, it would have been expected that the product of Olliver would also have such an appearance.

Applicant's arguments with respect to claims 14 and 15 are also deemed unpersuasive. Applicant argues that Olliver does not disclose mixing and addition at a controlled rate. However, Olliver does disclose rigorous mixing which the Examiner deems to be "controlled." Control is defined as exercising authoritative or dominating influence over (<http://www.dictionary.com>) and therefore, any action taken by the maker of the product is interpreted to be "controlled." As such, Olliver reads on the claims at hand. It is also noted that Olliver does disclose the addition of fruit (see Examples) and the order of steps has been discussed above.

Applicant's arguments with respect to the 35 U.S.C. 102 rejections of claims 13 and 19 over Olliver, Waitman, Gordon, and Baker, respectively, have been fully considered but deemed unpersuasive. The Examiner has not taken Official Notice as Applicant suggests. Rather, the Examiner has asked for a showing as to how the claimed product differs from that of the prior art. As the Patent Office does not possess the facilities to test the referenced composition and that of the claimed invention, the

burden then shifts to applicant to demonstrate any patentable difference between the two. Since these claims are product-by-process claims, Applicant must demonstrate how the process claimed creates a product different from that of the prior art. No evidence of this has been provided and the claim merely requires a food sauce. Applicant is referred to the discussion of *In re Thorpe* in the previous Office Action.

Applicant's arguments with regard to the rejections of claims 1, 14, and 15 over Waitman are unpersuasive. Applicant's arguments with regard to the requirement of a "controlled rate" have been discussed above. Applicant seems to have misunderstood the Examiner's position with regard to the cooking of the fruit. The Examiner does not dispute that Waitman teaches a preference for cooked fruits in its process. However, this is not a requirement, fresh fruits are not excluded, and also, there is no suggestion that the fruit is cooked immediately prior to addition and therefore still heated at the time of addition. Therefore, it would have been expected that the fruit, whether it was previously cooked or not, is at ambient temperature at the time of addition in Waitman. As such, it would lower the overall temperature of the mixture once added, as claimed by Applicant. The Examiner statement that it was not clear that substantial cooking of the fruit would occur at 190°F was meant to address step (c) of the claim. Whether the fruit was previously cooked or not is irrelevant to meeting this limitation; it only matters if the fruit is cooked or further cooked at the 190°F it is subjected to upon mixing. No evidence that the conditions of Waitman are sufficient to cook the fruit at this point has been submitted and as such, the prior art reads on the claim.

Applicant further argues that the combination of Waitman, Gordon, and Olliver is improper. The Examiner respectfully disagrees. All of the references relate to food sauces comprising low methoxyl pectin, calcium, and fruit, and as such, are deemed to be in the same field of endeavor. Additionally, motivation was supplied for the combination. For example, the teachings of Gordon make it obvious to use a smaller amount of calcium ion in the method of Waitman in order to avoid impairing the flavor of the final product. Olliver was relied on to further evidence the conventionality of using fresh fruit as opposed to cooked fruit as preferred, but not required by, Waitman. These are the only teachings from Olliver and Gordon relied on in this rejection and therefore, the differences in the specific processes taught by each do not defeat the rejection. As such, the rejections based on this combination are upheld.

Applicant argues that the combination of Olliver and Ross is not appropriate. Ross is relied on for the broad teaching that a thickener can be added to low methoxyl pectin that has been hydrated in an aqueous solution, and the mixture can then be heated to 170°F prior to the addition of a liquid fraction containing soluble calcium to obtain a stabilized jelly-like product (see Example). This teaching is applicable to Olliver, which is also dealing with low methoxyl pectin and a liquid fraction containing soluble calcium. Applicant also argues that Ross teaches away from Applicant's invention in a number of regards, including a different required ratio of calcium to pectin, but such a limitation is not in the claim language and regardless, Ross is not being relied on to teach any such limitation.

Applicant's arguments with regard to Daravingas are deemed unpersuasive. This reference is relied on merely for the teaching that it was known in the art to use xanthan gum in food sauces for the purpose of achieving a final product with good viscosity and consistency. The other limitations that Applicant argues Daravingas does not teach are taught by the Olliver and Ross references.

Applicant also argues that the combination of Olliver, Ross, Baker, and Waitman is improper and inadequate. The "controlled rate" limitation has been discussed above. The Examiner never stated that Waitman disclosed frozen fruit. It is also noted, that as discussed above, while Waitman prefers the use of cooked fruit, it does not require it, and therefore is not a divergent teaching from Baker. Additionally, Waitman was used in this rejection for the teaching that gel compositions comprising low methoxyl pectin and a soluble calcium liquid fraction may be refrigerated prior to serving in order to obtain a firmer gel.

Applicant's arguments with regard to the rejections of claims 12 and 18 over Olliver are unpersuasive for the same reasons discussed above with claims 1 and 14. It is also noted that the Examiner never took official notice in these rejections. The Examiner did not suggest that Olliver discloses the claimed rate. Rather, the Examiner's position is that it would have been obvious to one of ordinary skill in the art at the time of the invention to have mixed the ingredients together at a rate commensurate with the volume and viscosity of the product, as well as within the range of the equipment available in order to have all the ingredients properly mixed and

incorporated with each other, and it would not have involved an inventive step for one of ordinary skill to utilize a rate within the range as instantly claimed.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sarah L. Kuhns whose telephone number is 571-272-1088. The examiner can normally be reached on Monday - Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached at 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SLK



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